Decision 05-10-049 October 27, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Almond Tree Hulling Company et al. Complainants, vs. Pacific Gas and Electric Company and DOES 1 through 100, Defendant.	Case No. 04-01-020 (Filed January 21, 2004)

ORDER MODIFYING DECISION (D.) 05-05-048 AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. INTRODUCTION

In this order we dispose of applications for rehearing of Decision (D.) 05-05-048 ("Decision") filed by Almond Tree Hulling Company ("Almond Tree") and Pacific Gas & Electric Company ("PG&E").

In D.05-05-048, we determined that a group of almond hullers/shellers represented by Almond Tree are entitled to take electric service from PG&E under agricultural rates rather than the higher commercial rates they had previously been charged. As the central issue, we found that almond hulling and shelling does not "change the form of the agricultural product" within the meaning of PG&E's agricultural rate tariff. As a result, the Decision requires that Almond Tree receive a refund equal to the difference between what they were billed for their hulling/shelling activities under PG&E's commercial tariffs and what they should have been billed for these activities under PG&E's agricultural tariffs. The Decision requires refunds to be calculated from the date Almond Tree first requested to be placed on agricultural rates, and that the

refunds reflect whether the customers were on time-of-use (TOU) or non time-of-use (non-TOU) meters.

Timely applications for rehearing were filed by PG&E and Almond Tree. Additionally, both parties filed responses to the respective applications for rehearing.[1]

In its rehearing application, PG&E challenges the Decision on the grounds that: (1) the "change of form" analysis is inconsistent with prior Commission precedent by failing to engage in a before-and-after analysis of each constituent product; and (2) it erroneously finds that almond hulls are not constituent products. In addition, PG&E requests that if D.05-05-048 is upheld, guidance be provided regarding how the "change of form" analysis should be applied when there are more than one constituent products having market value.

Almond tree challenges the Decision on the grounds that: (1) it orders refunds only from the date Almond Tree first requested agricultural service rather than for a prior 3-year refund period; and (2) it provides that customers on non-TOU commercial meters are only entitled to be rebilled on non-TOU agricultural rates rather than the preferred TOU agricultural rates. In addition, Almond tree requests oral argument.

We have carefully considered the arguments raised in the applications for rehearing and are of the opinion that the Decision should be modified to grant a 3-year refund period, to be calculated for each huller/sheller 3 years prior to the date they first requested to be placed on agricultural rates. As to all other issues, we believe no grounds for granting rehearing have been demonstrated. In addition, for the reasons stated herein we deny PG&E's request for advisory guidance and Almond Tree's request for oral argument. Rehearing of D.05-05-048, as modified, is denied.

[1] On September 20, 2005, Almond Tree filed a petition for modification of D.05-05-048. Today's decision neither disposes of or is intended to prejudge the merits of issues raised in this petition.

II. DISCUSSION

A. Change of Form Analysis

PG&E argues that the Decision is inconsistent with previous Commission decisions, citing the following two cases as seminal cases on the issue of "change of form": *Air Way Gins et. al. v. PG&E* ("*Air Way Gins*") [D.03-04-059] (2003) ___ Cal. P.U.C. 3d ____, 2003 Cal. P.U.C. LEXIS 263 and *Producers Dairy Foods, Inc. v. Pacific Gas and Electric Company* ("*Producers*") [D.97-09-043] (1997) 74 Cal. P.U.C. 2d 677, 1997 Cal. P.U.C. LEXIS 850. PG&E contends the Decision improperly departs from these decisions in two regards. First, that in determining whether almond hulling/shelling results in a "change of form of the agricultural product," PG&E alleges that we erroneously failed to engage in a before-and-after analysis of each constituent product. Second and related, that like cottonseeds in *Air Way Gins,* PG&E claims that almond hulls have a viable market in their own right. Therefore, PG&E claims that the Decision is inconsistent with precedent by failing to explain why cottonseed constituted a secondary product but almond hulls do not. (Rhg. App., p. 3.)

1. Before-and-After Analysis of Each Constituent Product

In *Producers,* we considered whether milk processing constituted a "change of form of the agricultural product." In doing so, we did not engage in a before-and-after analysis of each constituent product of milk. While noting that processing results in different milk products based on fat content such as whole milk, skim milk, and cream, in *Producers* we simply identified milk as the product and then analyzed whether the form of that product is changed by each of the production processes – those being pasteurization, homogenization, and vitaminizing. (*Producers* [D.97-09-043], *supra,* 74 Cal. P.U.C. 2d at pp. 680-681.) In *Producers*, we concluded that none of the processing steps resulted in a "change of form" of milk and so agricultural rates were warranted.

In *Air Way Gins,* we considered whether cotton ginning constituted a "change of form of the agricultural product." In doing so, we considered two primary concepts: (1) a before-and-after analysis of constituent products identified as cotton fiber

and cottonseed; and (2) practical marketing considerations. As to the first, we rejected PG&E's argument that a before-and-after comparison must be restricted to seed cotton as a whole. We stated that "…although not dispositive…our prior decisions support a before-and-after comparison of the agricultural product's constituent parts – in this case cotton fiber and cottonseed – rather than requiring that the comparison be limited to the before-and-after condition of the raw product as it is harvested from the field." (*Air Way Gins* [D.03-04-059], *supra*, at p.14 (slip op.).) We determined that "the fact that the singular term "product" is used in PG&E's tariff eligibility statement does not **preclude** comparing the constituent parts of seed cotton (cotton fiber and cottonseed) before and after ginning." (*Id.* at pp. 15-16, fn. 16 (slip op.).) Viewing cotton ginning as essentially a separating and cleaning process, we determined that "ginning does not require that the cotton fiber or cottonseed be severed, crushed or cut into, all of which are processes that would seem to come within a common-sense definition of a "change of form." (*Id.* at pp. 11 & 14 (slip op.).) Thus, in *Air Way Gins* we concluded that because ginning does not change the form of the cotton in a way that irremediably damages or changes its constituent parts, it qualifies for PG&E's agricultural rates. (*Id.* at p.16 (slip op.).)

As to the second, in *Air Way Gins* we rejected PG&E's argument that practical marketing considerations were not a factor in *Producers* and should not be a factor there as well. (*Id.* at p. 16 (slip op.).) This factor was relevant for purposes of characterizing the agricultural product. Stating we did not believe the Legislature intended to force producers to find smaller markets (e.g., in *Producers* - small niche market for raw milk) in order to benefit from agricultural rates, we found that the nature of the "actual" markets for the products, and not "theoretical" markets, must be taken into account.

Our Decision regarding almond hulling/shelling takes great care to frame its conclusions in the context of concepts and analysis from both *Producers* and *Air Way Gins*. In the instant case, as in *Air Way Gins*, PG&E first argued that the raw product as harvested from the field, here the in-shell or unhulled almond, is the agricultural product and that the before-and-after comparison is restricted to whether the hulling/shelling

process changes that product. (PG&E Reply Brief, p. 6.) Similar to *Air Way Gins,* the Decision rejects that notion. Akin to the analysis in *Producers* identifying milk as the product subject to a before and after analysis, and drawing from the practical marketing considerations of both cases, we concluded that the almond, or almond meat, is the "agricultural product" and that hulling/shelling process does not change the form of that product. (D.05-05-048, pp. 12-13.) Our Decision reasons that almond orchards are planted for almond meat and not almond hulls or shells although they may also have a viable market. (D.05-05-048, p. 14.)

PG&E's contention that the Decision departs from precedent is incorrect. PG&E's construction of the requisite analysis is overly narrow. As discussed above, the analyses in *Producers* and *Air Way Gins* are not identical. They vary somewhat depending on the agricultural product in question and consider more than one factor.

Further, in *Air Way Gins,* we noted that "[a]lthough PG&E attempted to cloak its appeal in the language of administrative law, it is clear that many of its arguments simply represent disagreements…about where, on disputed facts, a particular line should be drawn in this tariff interpretation case." (*Air Way Gins* [D.03-04-059], *supra,* at p.11 (slip op.).) Further, we stated that "[t]he fact that PG&E disagrees with the judgments made…about how to characterize these physical processes, does not mean these judgments are arbitrary, capricious, or lacking in evidentiary support." (*Id.* at p. 12 (slip op.).) In the instant case, PG&E itself said "[t]he issue of whether Complainant's almond operations are eligible for agricultural rates essentially involves a line-drawing exercise." (PG&E Answer to Complaint, p. 1.) PG&E disagrees with where we determined to draw the line in this case. However, our conclusions are adequately based in the principles of *Air Way Gins* and *Producers.*

2. Cottonseed and Almond Hulls as a Secondary Products

PG&E asserts that the Decision failed to explain why cottonseed is a secondary product in *Air Way Gins* and almond hulls are not. PG&E argues that like

cottonseed in *Air Way Gins,* there is a viable market for almond hulls. PG&E says this renders the Decision inconsistent with prior precedent. (Rhg. App., p. 3.)

In *Air Way Gins* we recognized that the ginning of seed cotton produces cotton fiber which is bailed and sold to cotton merchants and cottonseed which is sold either to feed mills for use as livestock food or to oil mills that produce cottonseed oil. (*Air Way Gins* [D.03-04-059], *supra*, at pp. 4-5 & 19 [Finding of Fact 13] (slip op.).) A good deal of discussion is provided regarding California cotton production in general, and it is noted that there is a market for both cotton fiber and cottonseed. However, we did not explicitly refer to cottonseed as a secondary product or go into any greater discussion of that market beyond saying it can be sold for livestock or cottonseed oil. PG&E appears to have created the secondary market designation by implication, on the basis that in *Air Way Gins* we acknowledged that the larger market is for cotton fiber. However, in *Air Way Gins* we simply gave weight to practical marketing considerations such that the nature of actual markets for the products should be taken into account. (*Id*. at p. 16 (slip op.).)

Analogous to *Air Way Gins,* our Decision here recognizes that there is a viable market for both almond hulls and almond shells in addition to the larger market for unshelled almonds. (D.05-05-048, p. 14.) Similar to *Air Way Gins,* we weighed practical marketing decisions. (D.05-05-048, p. 12.) However, our Decision proceeds to explain how its view of almond hulls differs in this case. In this case, we viewed almond hulls and shells as agricultural residues, rather than agricultural products. (D.05-05-048, p. 14.) We reasoned that because there is a market for hulls and shells some might consider them as agricultural products in their own right, however, orchards are planted for almonds, not shells and hulls.

PG&E erroneously attempts to create a secondary market standard that would impose a new or extended analytical test on subsequent cases. No such test was created in *Air Way Gins.* While PG&E may disagree with our view of almond hulls, the Decision did explain the basis for its view that almond hulls are agricultural residue. PG&E's argument is without merit.

B. Almond Hulls as Constituent Products

PG&E contends that the Decision erred by applying the "change of form" analysis to only one constituent product, the most lucrative almond meat. PG&E contends that this departs from prior cases because *Producers* did not apply its analysis to only the most profitable of the milk products, and *Air Way Gins* did not apply its analysis to the most lucrative product, cotton fiber. PG&E states that because there is also an $80 million per year market for almond hulls, the Decision errs. (Rhg. App., p. 4.)

PG&E incorrectly attempts to link the concept of market value with the "change of form" analysis in a manner not supported by our previous decisions. That is, PG&E appears to suggest for the sole reason that a market exists for products such as raw milk in *Producers,* cottonseed in *Air Way Gins,* or almond hulls in this case, all those products must be subjected to a before-and-after "change of form" analysis.

In fact, *Producers* contains almost no discussion of market value. It does state there is a small market for raw milk in California, and thus, the main market and by implication the most lucrative market, is for processed milk. (*Producers* [D.97-09-043], *supra,* 74 Cal. P.U.C. 2d at p. 678.) However, that distinction is of no significance for purposes of how we analyzed "change of form." As explained above, in *Producers* we did not identify constituent parts of milk and then engage in a before-and-after "change of form" analysis of each part. We looked only at whether each step of the standardization process changes the form of "milk."

In *Air Way Gins,* when determining whether cotton ginning changed the form of constituent parts, we specifically considered whether the physical process of ginning required the parts to be severed, crushed or cut into and whether it irremediably damaged or changed those parts. (*Air Way Gins* [D.03-04-059], *supra,* at pp. 11 & 16 (slip op.).) That there was a market for the constituent parts or the relative value of those markets was of no consequence for purposes of applying the test or making a determination. There, we simply disagreed with PG&E's assertion that it must only apply the before-and-after analysis to the raw product, seed cotton.

The Decision acknowledges a viable market for almond hulls, but determined that the main constituent product for consideration, consistent with practical marketing considerations was the almond itself. (D.05-05-048, p. 13.) There is no reason for the Decision to further address the fact that almond hulls/shells have a viable market as PG&E contends because that fact was of no relevance to triggering the "change of form" analysis.

C. Request for Guidance

In PG&E's view, the Decision could be read to reach differing conclusions as to which constituent products should be analyzed under the "change of form" analysis when applied to varying agricultural commodities. Accordingly, PG&E requests that if we uphold D.05-05-048, we provide guidance in determining how the "change of form" analysis should be applied when there are more than one constituent products which have "substantial market value." (Rhg. App., p. 4.)

Several reasons compel denying this request. First, it is outside the permissible scope of an application for rehearing. Public Utilities Code Section 1732 and Rule 86.1 of the Commission's Rules of Practice and Procedure provide that applications for rehearing must specify any grounds on which an order or decision of the Commission is unlawful. The purpose is only to alert the Commission to legal error, so that is may be corrected expeditiously, if warranted. For the reasons stated above, PG&E's application for rehearing has not established legal error which requires action, nor does this request assert legal error.

Second, given the evolving nature of interpretations of PG&E's agricultural eligibility statement, it may be understandable that PG&E is unclear how to apply the analysis in all instances. However, even if we were inclined to provide further guidance, it would be futile to try and offer broad guidance on a topic requiring individual case by case consideration. Indeed, in *Air Way Gins* we noted that in recent times there seems to be a need for more case by case factual review in order to determine what activities

constitute a "change of form of the agricultural product."[2] Further, such guidance or clarification should be accomplished through a proceeding, where all interested parties may have notice and opportunity to be heard on the matter. The disposition of an application for rehearing is not the proper forum for requesting further guidance or a clarification of this particular matter. A petition for modification constitutes a more proper vehicle.

Finally, we have repeatedly declined such requests for advisory opinions absent a showing of extraordinary circumstances. For example, we stated "…we have a long-standing policy against issuing advisory opinions in the absence of a case or controversy, unless there are extraordinary circumstances presented."[3] Though PG&E expresses uncertainty regarding its own interpretive clarity, it has presented no extraordinary circumstances to warrant an advisory opinion in this instance.

D. Appropriate Refund Period

The Decision requires PG&E to calculate the refund for overcharges from the date Almond Tree first requested agricultural rates (Fall 2003) (D.05-05-048, p. 18 [Conclusion of Law 12].) Almond Tree contends the Decision is in error because Tariff Rule 17.1, Public Utilities Code Section 736, and *Air Way Gins* and *Producers* all

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[2] "[T]he change-of-form language was adopted in 1988 to address the agricultural working group's perceptions that inequities had resulted from the "on the farm/off the farm distinction in previous tariff eligibility statements. Even though the new tariff's reference to a "change of form of the agricultural product" seems imprecise and subjective, there was apparently a consensus that lasted for nearly a decade about which activities this language was intended to cover. Unfortunately, that consensus began to fray in the mid-1990's, and since then the Commission has had to decide at least two cases (Producers and this one) in which the principal issue has been what constitutes a change of form of the relevant agricultural product." (*Air Way Gins* [D. 03-04-059], *supra,* at p. 11 (slip op.).)

[3] *Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060* [D.03-09-027, at p. 2 (slip op.)] (2003) ___ Cal. P.U.C. 3d ____, 2002 Cal. P.U.C. LEXIS 1012, citing *Rulemaking to establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Etc.* [D.00-01-052, at pp.12-13 (slip op.)] ___ Cal. P.U.C. 2d ___, 2000 Cal. P.U.C. LEXIS 108.

mandate a 3-year refund period. (Rhg. App., pp. 6-9.) In addition Almond Tree contends the Decision establishes bad policy. (Rhg. App., p. 20.)

1. Tariff Rule 17.1

Tariff Rule 17.1 ("Rule 17.1") provides that if a customer was overcharged due to "billing error," PG&E shall provide a refund for a 3-year period. "Billing error" is defined by Rule 17.1 A. to include "an inapplicable rate."

Almond Tree contends that Rule 17.1 clearly and unambiguously requires a 3-year refund for overcharges on an "inapplicable rate" and the Decision erred in finding that service under the commercial tariff was not under an "inapplicable rate." Almond Tree reasons that the commercial rate tariffs under which they were served explicitly state they do not apply to customers who qualify for agricultural rates. Therefore, Almond Tree claims that since the Decision finds agricultural rates do apply, commercial rates are *ipso facto* inapplicable. (Rhg. App., p. 7.)

Generally, in interpreting the tariff requirements, we must look to the ordinary meaning of words and interpret them in a reasonable way given their context. While we may rely on additional sources if the tariff language is ambiguous, we retain discretion to determine whether an interpretation of a tariff sought by a party is reasonable. Tariffs, like statutes, should be read in context, as a whole and in a reasonable, common-sense way.[4]

[4] Commission approved tariffs have the force and effect of law. (*Dyke Water Co. v. PUC* 56 Cal. 2d 105, 1961 Cal. LEXIS 352.) Tariffs filed with the Commission are administrative regulations, and are subject to the same rules that govern the interpretation of statutes. To interpret a tariff the Commission must look first at its language, giving the words their ordinary meaning and avoiding interpretations which make any language surplus. The Commission must interpret the words of a tariff in context and in a reasonable, common-sense way. If the language of the tariff is clear, the Commission need not look further to interpret the tariff. If ambiguity exists, the Commission may rely on sources beyond the plain language of the tariff, such as the regulatory history and the principles of statutory construction, to interpret the tariff. An ambiguity exists if language in a tariff may reasonably be interpreted in more than one way. The Commission has discretion to determine whether an interpretation of a tariff sought by a party is reasonable. (*Zacky & Sons Poultry Co, v. Southern California Edison Company*, [D.03-04-058, at p. 4 (slip op.)], *(2003)* ___ Cal. P.U.C. ___, 2003 Cal. P.U.C. LEXIS 273.)

Almond Tree correctly states that the commercial tariff schedules under which they were served explicitly state that they do not apply to service for which agricultural rates are applicable. However, the agricultural tariff schedules also contain explicit language stating they do not apply to service for which commercial rates are applicable. Where the central issue here is a dispute as to "applicable" rate schedules, the competing language of these rate schedules alone is not necessarily determinative.

Consistent with statutory interpretation principles, the Decision was required to consider Rule 17.1 in conjunction with PG&E's agricultural rate eligibility statement. The language of Rule 17.1 is straightforward. Overcharges due to an "inapplicable rate" require a 3-year refund.[5] On the other hand, it is not disputed that "change of form" language under the eligibility statement is ambiguous. (See D.05-05-048, p. 15.) Given this ambiguity, rules of statutory and tariff construction permit us to exercise discretion in reaching a result. In doing so here, the Decision only goes so far as to agree that Almond Tree is entitled to electric service under agricultural rate tariffs. The Decision expresses the Commission's duty to reach what is in our view a fair and reasonable result. Reasoning that the "applicable" rate schedule is the matter at issue in the proceeding, and that the "change of form" language in the agricultural eligibility statement is subjective and imprecise, we did not agree PG&E had placed Almond Tree on an "inapplicable rate." (D.05-05-048, pp. 17-18.) This determination constitutes a reasonable and justifiable exercise of our discretion.

Nevertheless, Almond Tree argues that a different outcome is warranted based on *Pac-West Telecomm, Inc., vs. Pacific Bell Telephone* Company [D.03-03-045, at pp. 2-3 (slip op.)] ___ Cal. P.U.C. 3d ___, 2000 Cal. P.U.C. LEXIS 161, and *Air Touch Cellular vs. Pacific Bell* [D.98-12-086, at p. 8 (slip op.)] (1998) ___ Cal. P.U.C. 3d ___, 1998 Cal. P.U.C. LEXIS 1014. These cases both provide: "[T]he tariff should be

[5] It should be noted, however, that although Rule 17.1 defines "billing error" to include "inapplicable rates", the Rule does not go on to define under what circumstances or conditions "an inapplicable rate" is considered to have occurred.

given a fair and reasonable construction and not a strained or unnatural one…constructions which render some provisions of the tariff a nullity and which produce absurd or unreasonable results should be avoided. . . ." Almond Tree points out that the Decision in this case does have a nullifying effect. Specifically, Almond Tree argues that if as a result of the Decision, agricultural rates only become "applicable" at the time we say so, then the requirement under Rule 17.1 to provide a 3-year refund for overcharges due to "inapplicable rates" is in fact nullified and rendered meaningless. (Rhg. App., p. 16.)

Almond Tree also cites to *Westcom Long Distance vs. Citizens Utilities Co. of California* [D.92-08-028, at p. 7 (slip op.)] (1992) 45 Cal. P.U.C. 2d 263, 1992 Cal. P.U.C. LEXIS 553 and *Ortega vs. Fresno MSA Limited Partnership* [D.95-09-116] (1995) 61 Cal. P.U.C. 2d 558, 1995 Cal. P.U.C. LEXIS 799. Almond Tree argues that these decisions require that ambiguous tariff provisions are to be resolved in favor of the customer and against the utility. (Rhg. App., pp. 10-11.) While Almond Tree is wrong that the Decision effectively re-writes Rule 17.1 to create a new "Close Call Exception" (Rhg. App., p. 10.), it is correct that the result under the Decision is contrary to the tariff interpretation rules under these cases to the extent that here, the ambiguous tariff language under the agricultural eligibility statement is resolved in favor of the utility rather than the customer.

Finally, Almond Tree cites Court decisions which uniformly hold that judicial decisions interpreting statutes must be given retroactive effect, citing to *Burris v. Superior Court* (2005) 34 Cal. 4th 1012, 2005 Cal. LEXIS 15; *Donaldson v. Superior Court* (1983) 35 Cal. 3d 24, 1983 Cal. LEXIS 256; *People v. Garcia* (1984) 36 Cal. 3d 539, 1984 Cal. LEXIS 202; *Woolsey v. State* (1992) 3 Cal 4th 758, 1992 Cal. LEXIS 5058. (Rhg. App., pp. 14-16.) These cited cases involve evaluation of whether decisions can be applied retroactively vs. prospectively and occurred largely in the context of criminal prosecutions where retroactive application was significant for purposes of finding guilt or innocence. Almond Tree has not demonstrated applicability of these cases in the context of classifying proper rate tariffs and the cases are not directly

relevant. Nonetheless, the cases generally find that decisions which do not establish new rules or standards can be applied retroactively. Because our Decision does not change Rule 17.1 or establish a new rule, the determination to order refunds retroactive to the date Almond Tree first requested agricultural rates was consistent with these principles. While Almond Tree argues a greater 3-year refund period is required, these cases are not dispositive in that regard.

The law recognizes that where tariff ambiguities exist, a fair amount of discretion rests with the decision-maker. Therefore, there was no legal error in the Decision *per se*. Nevertheless, when balanced against the full range of statutory and tariff interpretation principles discussed above, we are persuaded that the Decision should be modified to apply the 3-year refund period under Rule 17.1.

2. Public Utilities Code Section 736 and Prior Decisions

Almond Tree contends that the refund period under the Decision is in error because it contradicts Public Utilities Code Section 736 and the holdings in *Air Way Gins* and *Producers, supra,* which require a greater 3-year refund period. (Rhg. App., pp. 8-9, 17-20.)

Public Utilities Code Section 736 sets a limitation of 3 years from the time a cause of action accrues (which may be extended 6 months) for filing before either the Commission or a court with concurrent jurisdiction for recovery of certain damages such as overcharges exceeding the tariff rate. In setting limitations on the utility's ability to collect for undercharges as well as the utility's obligation to provide refunds for overcharges, we issued D.86-06-035[6], which comports with the time requirements set forth in Section 736 as well as Section 737 to establish a 3-year period .[7]

[6] *Re: Retroactive Billing by PG&E to Correct Alleged Meter Underbillings Due to Meter Error and Meter Fraud* [D.86-06-035] (1986) 21 Cal. P.U.C. 2d 270, 1986 Cal. P.U.C. LEXIS 888.

[7] Section 737 provides that utility claims for the "collection of lawful tariff charges" may be filed in court within 3 years of the date the cause of action accrues.

Almond Tree argues that the facts of this case are identical to *Air Way Gins* and *Producers.* Specifically, each case involves commercial customer requests to be served on PG&E's agricultural rate tariffs. Each case involves determinations regarding interpretation of the "change of form" analysis. Similar to this Decision, *Air Way Gins*, specifically acknowledged the ambiguity of the "change of form" language under PG&E's agricultural rate eligibility statement. (*Air Way Gins*") [D.03-04-059], *supra*, at p. 11 (slip op.).) Finally, each case explicitly questions whether to grant refunds based on the date first requested or a 3-year refund period. Both prior cases concluded that under the law established by Public Utilities Code Section 736 and D.86-06-035, a 3-year refund period was required. (*Id.* at p. 17 (slip op.).); *Producers* [D.97-09-043], *supra*, 74 Cal. P.U.C. 2d at p. 682.)

Absent extraordinary circumstances, we have generally applied the statutory 3-year period for refunds. We are persuaded there are no unique facts in this case to warrant deviation. Thus, we will modify the Decision to provide for a 3-year refund in the manner set forth below in the ordering paragraphs.

3. Factual and Policy Arguments

Almond Tree argues the Decision errs because we were "apparently swayed" by PG&E's contention that during the *Air Way Gins* case it requested Commission guidance regarding whether agricultural rates should apply to almond hulling and shelling. (Rhg. App., pp. 11-14.) The argument is vague and fails to establish legal error. Thus, the argument is without merit.

Also, in stating that the Decision results in bad policy, Almond Tree repeats prior arguments, contends the Decision will increase uncertainty and unpredictability for utilities and their customers, and raises a vague unfairness argument, accusing the Commission of improperly establishing a new refund rule. (Rhg. App., pp. 20-23.) We disagree. The policy arguments raised by Almond Tree fail to specify any legal error, and thus, do not establish a basis for granting the rehearing application. (See Pub. Util. Code Section 1732.)

E. Use of TOU and non-TOU Data for Refund

The Decision requires that when PG&E calculates refunds for the Almond Tree customers, TOU and non-TOU rates should reflected. Accordingly, refunds for the customers previously on commercial non-TOU rates should be rebilled under the agricultural non-TOU rate (Schedule AG-1), and those previously on commercial TOU rates, should be rebilled under the TOU agricultural rate (Schedule AG-5). (D.05-05-048, p. 17 [Ordering Paragraph 2])[8] Almond Tree believes that even the previously non-TOU customers should receive refunds under a TOU rate. Almond Tree contends the Decision is contrary to PG&E Tariff Rule 12, and also raises various other factual arguments.

1. Tariff Rule 12

Almond Tree argues that because the non-TOU customers explicitly requested service under agricultural TOU Schedule AG-5 in Fall 2003, Rule 12(B) requires PG&E to place them on that schedule. In addition, Almond Tree contends that under Rule 12(C), the requested rate change should have taken place at the next regular meter reading or change date after the request was made. Accordingly, Almond Tree states the Decision ignores the customers' choice of rate and errs by allowing PG&E to calculate refunds based on non-TOU AG-1 rates. (Rhg. App., p. 24.)

Tariff Rule 12(B) states in pertinent part:

> "[a]t the time of application for service, PG&E will, based on information provided by the applicant, ensure that applicant is placed on an applicable rate schedule.…Based on the information provided by the customer, PG&E will advise the customer regarding its optimal rate. If the customer chooses not to provide information such that PG&E cannot ascertain the customer's optimal rate, the customer may: (1) request that PG&E place the customer on an applicable rate schedule…; or (2) elect to contact PG&E at a later date to establish service, after the customer has obtained sufficient information to allow PG&E to advise customer regarding its optimal rate."

[8] This rehearing issue applies only to 10 of the 33 Complainants who do not have TOU meters.

Tariff Rule 12(C) provides in pertinent part that:

> "[c]hanges in rate schedules will take effect starting with the next regular meter reading…following receipt of the Customer's request…unless: (1) the rate schedule states otherwise, (2) a written agreement between PG&E and the Customer specifies another date, or (3) the required metering equipment is unavailable."

As previously discussed, in interpreting tariffs we must look to the ordinary meaning of words and interpret them in a reasonable way given their context. Where the language may be ambiguous, we will determine whether an interpretation of a tariff sought by a party is reasonable.[9]

As to Almond Tree's argument that Rule 12(B) required PG&E to put them on the requested schedule, it is true that Almond Tree requested to be changed from commercial service to AG-5 TOU agricultural service. Rule 12(B) generally requires PG&E to place the entity requesting service on "an applicable rate schedule" based on information provided by the applicant.

Whether the "applicable rate" was commercial or agricultural was the primary issue in dispute in the proceeding. (D.05-05-048, p.17.) Nothing in the plain meaning of Rule 12(B) can be reasonably be read to require PG&E to change Almond Tree from commercial to agricultural rates or specifically AG-5 rates only because it was requested. The Rule suggests adequate information is also required such that the correct new service rate can be verified. In addition, nothing in Rule 12(B) suggests PG&E is required to automatically place the customer on the requested rate, if as here, PG&E did not agree the agricultural rate was applicable. Almond Tree is incorrect that Rule 12(B) on its face requires that it should have been placed on agricultural rates under the circumstances of this case.

As to Almond Tree's position that Rule 12(C) required the requested rate change to take place at the next regular meter reading after the request, tariff

[9] See decisions cited in fn. 4, *supra*.

interpretation rules require considering the related provisions of Rule 12 together. Rule 12(C) applies to the timing of when new service changes take effect. It is reasonable to construe Rule 12(B) as a condition precedent to action under Rule 12(C). The dispute recognized in the Decision goes directly to Rule 12(B) and would frustrate action under Rule 12(C) until such time as the dispute is resolved. Further, Rule 12(C)(1) provides for an exception to the timing requirement if the rate schedule states otherwise. Here, existing commercial customers requested service under agricultural rate schedules. The agricultural rate schedules (AG-1, AG-5) both state that they do not apply to service for which a commercial/industrial schedule is applicable. Again, the dispute as to whether the agricultural rate schedule applies may trigger the exception under Rule 12(C)(1). Almond Tree is incorrect that Rule 12(C) on its face requires that agricultural rates should have been implemented at the first regular meter reading after the request was made under the circumstances of this case.

As a related point, Almond Tree argues that had PG&E put non-TOU customers on agricultural rates when first requested, Rule 12(B) would have required PG&E to inform them of the optimal rate structure which in its view is not AG-1. Almond Tree states that failure to do so was "billing error" under Rule 17.1. (Rhg. App., p. 26.)

Almond Tree's argument does not raise any error in the Decision, but is merely a criticism of PG&E. Nevertheless, in looking at Rule 17.1 it provides in pertinent part that: "billing error includes "… an inapplicable rate," or…failure to provide the Customer with notice of rate options in accordance with Rule 12." As previously noted, the "applicable rate" was the main issue in controversy in this proceeding. Accordingly, Rule 12(B) cannot be reasonably read to impose a requirement on PG&E to advise Almond Tree of optimal rate options under the agricultural schedule until the dispute was resolved.

Finally, whether PG&E is able to estimate refunds for non-TOU customers under TOU rates is a factual issue raised by both parties in comments on the Decision.

We considered comments in the record provided by both parties and properly determined that the refunds reflect prior non-TOU and TOU usage.

2. Factual Arguments

Almond Tree contends the Decision improperly results in certain refunds to be calculated on non-TOU AG-1 rates when in fact AG-1 was not designed for large users like almond hullers, and the resulting calculation benefits PG&E, and PG&E's assertion it lacks adequate data to rebill non-TOU customers on TOU rates is specious. (Rhg. App., pp. 23-25, 27, 29-30.) In support of this argument Almond Tree submits rate comparison data and contests various usage and charge assumptions. (Rhg. App., pp. 27-29, Appendix A.)

These arguments have no merit and merely challenge how we considered and weighed the evidence in the record to reach our determination. Further, certain portions of Almond Tree's application for rehearing and the attached Appendix A constitute improper new and additional evidence that is not in the record. Accordingly, we will not consider this additional new information.

F. Request For Oral Argument

Almond Tree requests an oral argument regarding the issues raised in its application stating that the Decision "adopts new Commission precedent or departs from existing Commission precedent without adequate explanation."

Rule 86.3 of the Commission's Rules of Practice and Procedure states that an oral argument will be considered if the application or a response (1) demonstrates that the oral argument will materially assist the Commission in resolving the application, and (2) the application or response raises issues of major significance for the Commission pursuant to enumerated criteria. (Rule 86.3 of the Commission Rules of Practice and Procedure, Code of Regs., tit. 20, §86.3.)

In its rehearing application, Almond Tree provides no explanation of why or how the stated criteria apply to this case and how it would otherwise meet the standard for consideration for oral argument. Accordingly, the request for oral argument is denied.

III. CONCLUSION

As explained above, D.05-05-048 is modified to provide a 3 year refund period to be calculated for each huller/sheller 3 years prior to the date they first requested to be placed on agricultural rates. PG&E's request for advisory guidance is denied. Almond Tree's request for oral argument is denied. As to all other issues raised by PG&E and Almond Tree, good cause does not exist for the granting of either rehearing application. Therefore, rehearing of D.05-05-048, as modified, is denied.

Therefore **IT IS ORDERED** that:

1. The text of D.05-05-048, p. 17, first sentence of the second full paragraph shall be modified to read:

> "We agree with Almond Tree that refunds are warranted 3 years prior to the date originally requested by Complainants in the Fall of 2003."

2. Conclusion of Law No. 12 on page 22 is modified to read:

> "Each complainant should receive the refund described in the preceding Conclusion of Law for the period 3 years prior to the date each huller/sheller requested to be placed on agricultural rates, as set forth in Exhibit B attached to the complaint in this proceeding, to the date each complainant is converted to an agricultural rate."

3. Ordering Paragraph No. 2 on page 23 is modified to read:

> "PG&E, within 90 days after the mailing date of this decision, shall refund to each complainant in this proceeding, for the period 3 years prior to the date set forth under the column labeled "Date Requested" in Exhibit B attached to the complaint herein, and ending on the date that each complainant is converted to an agricultural tariff, an amount equal to the difference between what such complainant was billed for its almond hulling/shelling activities under the commercial tariff that PG&E applied, and what such customer should have been billed for its almond hulling/shelling activities under PG&E's applicable agricultural tariff. Refunds shall reflect whether a customer was on time-of-use rates or not. That is, customers on time-of-use commercial meters are to be rebilled on time-of-use

agricultural rates and likewise for non time-of-use meters, and the difference refunded."

4. Rehearing of D.05-05-048, as modified, is hereby denied.

This order is effective today.

Dated October 27, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners